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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 936

STEPTOE AND JOHNSON, ET AL.,
*Petitioners,*

*v.*

FORT MYERS SEAFOOD PACKERS, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case on June 21, 1967.

## CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 1b, is reported in —— U. S. App. D. C. ——, 381 F.2d 261. The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, p. 1a, is reported in 253 F. Supp. 626.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1967. Rehearing *en banc* was denied on September 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. May the Court of Appeals for the District of Columbia, in the face of controlling local and Supreme Court decisions, allow a suit for legal malpractice to be maintained subsequent to the running of the statute of limitations?
2. Does each new element of damage resulting from the same tort extend the three year statute of limitation—contrary to the congressional intent as expressed in the word "accrues"—to the date of its occurrence?

## STATUTE INVOLVED

D. C. Code § 12-301 (1967 ed.):

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

* * * * *

(8) for which a limitation is not otherwise specially prescribed—3 years.

## STATEMENT OF THE CASE

On July 22, 1965 respondent, Fort Myers Seafood Packers, Inc., a Florida corporation of which J. Carl Abbott was president and principal owner, filed a complaint against the Washington, D. C. law firm of Steptoe and Johnson and I. Martin Leavitt, one of the partners, "For Damages Based on False and Fraudulent Warran-

ties, Negligence and Improper Legal Advice" arising in 1962 out of a contemplated fishing boat venture in Venezuelan waters.

Petitioners, on a retainer basis, were Washington attorneys for a New York seafood importer of which a Mr. Bent Mogelberg was vice president. Mogelberg had been in direct contact with respondent's president about a plan whereby a small fleet of shrimp boats controlled by respondent would be taken from Florida to Venezuelan waters, to catch shrimp which would be first frozen by a Venezuelan company, then distributed by the New York importer.

In preliminary conferences to which petitioners were not privy, both a director of the Venezuelan company and the New York importer allegedly assured respondent's president that it would be legally unnecessary for him to change the American registry of the boats to Venezuelan in order to fish there (J.A. 92a, 115a, 116a, 148a).[1]

In May, 1962, the New York importer sent petitioners a marked copy of a contract, which had previously been used in a similar venture in Colombia, along with a list of typewritten changes "which would apply in the contract between boat owners and Frioven-Zulia, S. A. in Venezuela". One of the attached list of changes was to be:

> "Neither the laws of Venezuela nor the provisions of this contract require or contemplate any change in the present American Registry of the vessel, except for such temporary registration permit which will be granted the vessel for its operations in Venezuelan waters for the duration of this Agreement. Such temporary permit shall not affect American registry of the vessel and if at any time a permanent change in Registry is required, this contract shall terminate immediately." (J.A. 30a)

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[1] References are to the Joint Appendix, filed in this Court as a part of the record below.

Pursuant to his client's instructions petitioner Leavitt incorporated the following in the draft of a proposed contract between respondent and the Venezuelan processor:

> "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)."

The New York client did not ask petitioners what the Venezuelan law was with respect to the provision for change in the American registry of the vessel (J.A. 183a), nor to check on what that law was (J.A. 220a). The attorney had no knowledge one way or the other on the subject (J.A. 177a) and at no time was instructed to investigate the matter. Pursuant to his New York client's instructions (J.A. 201a, 206a, 207a, 221a), petitioner Leavitt conformed the draft to the earlier contract and on May 16, 1962 forwarded to respondent a draft of the proposed contract with a covering letter stating that it contained the language of the Colombian contract except for changes to identify the Venezuelan company "and to incorporate the various changes set forth on a list sent to me by Mr. Mogelberg" and cautioning (J.A. 19a):

> "I suggest you read very closely the enclosed contract, and if any changes need be made, make them prior to execution."

Petitioner Leavitt at no time represented to respondent that he was an expert on, or had looked up, Venezuelan law. (J.A. 39a). In fact respondent's president deposed that when he received the draft contract sent May 16, and before he made an investigatory trip to Venezuela, he would have said "forget it" [the venture] if he had known that a change of flag would be required under Venezuelan law:

> "My response to that was that I would never move out of the United States if I had to change the flag. 'Unless you make arrangements to us—or your com-

pany makes arrangements to furnish me with work visas, fishing licenses, navigational permits, and allow me to work under the United States flag, forget it.'" (J.A. 115a).

On May 24, 1962 (J.A. 103a, 106a, Abbott Dep. 57) respondent's president left Florida for an investigation trip to Venezuela which lasted for seven days (Abbott Dep. 57, 58). He took with him a fishing gear expert, some of whose expenses were borne by respondent (Abbott Dep. 43). The inspection trip expenses were to come out of respondent's profits from this operation if and when he decided to take the fleet of boats to Venezuela (Abbott Dep. 97). Following the return of his inspection party to the United States, respondent decided to enter into the venture (J.A. 106a).

At the request of their New York client, petitioners between June 16, 1962 and July 17, 1962 successfully processed the applications of respondent for United States Maritime Administration approval for time charters of the American vessels to the Venezuelan company (J.A. 107a, 109a). Had the parties in their initial negotiations decided on a sale rather than a charter, approval of the application would have been granted just as quickly, but would have required the filing of a different set of forms with the Commission.

Before dispatching the nine vessels from Florida for Venezuela on July 18, 1962, for what was contemplated would be a two-year stay, respondent equipped them with "extra equipment" he would not have had to carry if the fishing were in Texas waters where spare parts would have been accessible (Abbott Dep. 258), this being:

> "Equipment necessary to keep the boats shrimp fishing, extra webbing, extra cables, extra batteries, extra propeller shafts, extra propellers, quantities of engine parts, all of my machine tools."

Respondent knew from his May 1962 trip of investigation that he had to get a crew list together, list the equipment aboard the vessels, radios, radio license numbers, radio wattage output, all of the extra cargo listed as ships' equipment, the tonnage of the vessel and the registered length and mail them to Venezuela for use in obtaining work visas, fishing licenses and navigational licenses (Abbott Dep. 166). This significant activity was carried out about two weeks before leaving the United States.

Upon their arrival in Venezuela July 25, 1962, the boats were temporarily impounded, according to respondent for illegally entering Venezuelan waters under American registry (J.A. 127a, 128a). The respondent-owned vessels were later released and sailed for the United States before mid-August, 1962 (J.A. 134a).

In response to a request *from their New York* client (J.A. 210a), petitioners ascertained informally from United States officials that it would be permissible to sell the boats temporarily to a Venezuelan company and later retransfer them to American registry. This information was transmitted by appellees *to its New York client* by letter of August 15, 1962 (J.A. 83a, 133a), not "to appellant" as the Court of Appeals' opinion erroneously states. See Appendix B, *infra*, p. 2b.

On July 22, 1965, three years and 67 days after the draft of the proposed contract had been sent by petitioners to respondent, this action was filed against them. [A separate lawsuit was instituted against the New York importer.]

Petitioners pleaded the statute of limitations and, after depositions of respondent's president and of petitioner Leavitt, moved for summary judgment. The motion was granted by the District Court upon the ground that the cause of action accrued on May 16, 1962, the date petitioners sent respondent the contract containing the al-

legedly erroneous statement of law, rather than on July 25, 1962, the date respondent's American-registered boats were temporarily impounded upon their arrival in Venezuelan waters.

The Court of Appeals, however, reversed the District Court. It rejected the holding of the District Court and decisions of this Court that limitations began to run at the time the allegedly erroneous advice was given and held that "the suit was timely *whether or not appellees' advice had previously caused other damage.*" (Emphasis added.)

## REASONS FOR GRANTING THE WRIT

### 1. The decision below is so clearly in conflict with applicable local decisions as to warrant exercise of this Court's ultimate judicial responsibility over the District of Columbia.

Prior to the date the decision in the instant case was rendered, the law with respect to the running of the statute of limitations in the District of Columbia was always construed in a manner consistent with the statutory intent:

> "The statute of limitations is 'three years from the time when the right to maintain such action shall have accrued.'" *Finegan* v. *Lumbermens Mutual Casualty Company*, 117 U. S. App. D. C., 276, 278, 329 F.2d 231, 233 (1963), citing D. C. Code, § 12-201 (1961 ed.) and *Wilcox* v. *Plummer*, 29 U.S. 172 (1830), a decision of this Court presenting the exact question decided in the instant case (see point two, *infra*).

In *Hanna* v. *Fletcher*, 97 U. S. App. D. C. 310, 231 F.2d 469, cert. den., 351 U. S. 989 (1956), the Court of Appeals for the District of Columbia was presented with the question of when an action "accrues" under District

law. It succinctly stated that an action in tort accrues at the time "injury result[s] from the alleged negligence." In the instant case, however, the Court of Appeals felt no compulsion to follow this clear guideline but rather established a new statute of limitations for the District of Columbia which in effect reads:

> "An action may be brought three years from the time the maximum damage complained of occurred."

The Court of Appeals found that respondent suffered damage on July 25, 1962, some two months after the alleged erroneous advice was given. But, it said it would "not now consider whether it might have been found the appellees' advice had caused damage before the boats were impounded, or whether recovery might have been had for such earlier damage." Appendix B, *infra*, p. 3b. In so doing the court glossed over the crucial issue which prompted the District Court to grant the motion for summary judgment: that respondent suffered damage as of May 16, 1962 and as of *that date* was entitled to bring an action against the petitioners. The Court of Appeals' startling formulation means that no matter when the original wrong took place, and no matter on what date the plaintiff was entitled to sue, limitations ran from the time the particular damage for which relief was sought occurred, not when the "right to maintain such action shall have accrued."

For example, if after the damage which resulted from the July 25 seizure, the boats were released and then reimpounded and confiscated, we can assume under the decision in the instant case that limitations would not run from their original detention on July 25, but rather from the second impounding and confiscation, the theory being that the damages incurred at final confiscation exceeded the damages incurred on July 25. It is an elementary legal principle that if petitioners had in fact given erroneous legal advice the respondent would be entitled to

maintain an action against them immediately after the first seizure. This same principle applies to the damages respondent immediately suffered when he received and relied upon the allegedly erroneous advice. But the Court of Appeals in deciding the *only* question in this case—when limitations began to run—felt they need not consider "whether or not appellees' advice had previously caused other damage." It is incomprehensible that in deciding when a cause of action "accrued" a United States Court of Appeals would feel it unnecessary to consider when the plaintiff first suffered injury and could have first maintained his suit.

This interpretation of the District's statute of limitations will wreak havoc upon the administration of the District's laws. Each time a new pain results from an auto accident the statute now appears to start anew. For, the courts will simply not consider whether the accident "had previously caused other damage." To correct such situations the Supreme Court has, on numerous occasions, exercised its jurisdiction to review decisions interpreting and applying statutes limited in effect to the District where the interpretation is of great importance to the administration of the District's laws. *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944); *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941); see also *Washington Fid. Ins. Co.* v. *Burton*, 287 U. S. 97 (1936).[2]

An action against an attorney for breach of duty in performing services, or for negligence, accrues at the time

[2] "The rule that this Court ordinarily will refrain from reviewing decisions dealing with matters of local law in the District of Columbia is a sound and necessary one. But it is not to be applied without discretion. Like most rules, this one has its exceptions. And those exceptions are grounded primarily in considerations of public policy and of sound administration of justice." Dissenting opinion of Mr. Justice Murphy in *Fisher* v. *United States*, 328 U.S. 463, 490 (1946).

the breach of duty takes place and not when the breach is discovered or actual damage results. In *Griffith* v. *Zavlaris*, 30 Cal. Rptr. 517 (1963) an attorney was charged with negligently failing to advise his client as to the applicability of a securities regulation which required the obtaining of a permit. The cause of action accrued, the court held, when the erroneous advice occurred and not on the date the alleged negligence was discovered. To the same effect is *Goldberg* v. *Bosworth*, 215 N.Y.S. 2d 849 (1961), holding that the statute of limitations began to run on the date the attorney's breach of duty occurred and not when the ultimate damage was sustained.

The above cases follow the controlling decision of this Court in *Wilcox* v. *Plummer*, *supra* (see point two *infra*), holding limitations run from the time the erroneous advice is given. As recently as 1963 in *Finegan* v. *Lumbermens Mutual Casualty Co.*, *supra*, the Court of Appeals for the District cited *Wilcox*, *supra*, in affirming the granting of summary judgment based on the statute of limitations as to a negligence count upon the accepted theory that the statute ran from the breach of duty.

The lower court's modification of that rule and the statute cannot be justified on the basis of Congressional ambiguity in drafting. There is nothing obscure or ambiguous in the Congressional direction contained in D. C. Code § 12-301 (1967 ed.) that "Except as otherwise *specifically* provided by law," actions for the following purposes "*may not be brought*" after the expiration of the period specified "*from the time the right to maintain the action accrues*" (Emphasis added). Note that Congress did not say that suit may be brought more than three years "after the most serious consequential damage has occurred," nor "from the time that the particular damage occurs for which relief is sought," which is the effect of the holding in the instant case that "suit was timely

whether or not appellees' advice had previously caused other damage."

The heretofore controlling law in the District on when a cause of action accrues, the recognition in the District of *Wilcox*, *supra*, the clear and unambiguous language of the District's statute of limitations, and the havoc which the lower court's interpretation will wreak upon the administration of the District's laws call for the exercise of this Court's jurisdiction so as to resolve this substantial question in a manner consistent with established judicial interpretations.

**2. The decision of the Court of Appeals is in direct conflict with controlling decisions of this Court.**

In 1830 this Court was confronted with the exact question presented below: "When does an action against an attorney for malpractice accrue?" Had the lower court carefully considered *Wilcox* v. *Plummer*, 29 U. S. 172, it is doubtful petitioners would now need ask this Court to take jurisdiction. In *Wilcox* a client sued his attorney for failing to name all the parties in an action on a note. In construing when the action accrued this Court said:

> "When the attorney was chargeable with negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action." At 182.

The fact that in *Wilcox* the suit was in assumpsit does not make the case's holding inapplicable in the instant tort situation. In *Amy* v. *Dubuque*, 98 U. S. 470 (1879) this Court was faced with the question of when limita-

tions commenced to run where the suit was in contract. The "cause accrue[d]", the Court said, "from the time the right to sue for a breach attaches." At 476. In other words no matter what the nature of the cause of action —assumpsit, negligence, or contract—limitations run from the time the aggrieved party could have first maintained an action—*first filed his suit.*

In deciding when a cause of action accrued in *Scoville* v. *Thayer*, 105 U. S. 143 (1882), this Court rephrased the question in a manner not unlike that here advanced by petitioners and as adopted by the District Court below:

> "In other words, when could they have commenced this action against this defendant to recover the amount due on his stock." At 153.

More recently in *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59 (1953), the question of when a "cause of action accrued" under the Portal-to-Portal Act was presented to the Court. There a District court had granted petitioner's motion for summary judgment on the ground that limitations had run. The Court of Appeals reversed holding that limitations did not begin to run from the time the petitioner violated the Act (here the Walsh-Healey Act) but rather from the time it was administratively determined that in fact a violation had taken place. In reversing the Court of Appeals this Court said:

> "We conclude that 'the cause of action accrued,' within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed * * * A cause of action is created when there is a breach of duty owed the plaintiff. It is the breach of duty, not its discovery, that normally is controlling." At 65.

The clear impact of these Supreme Court decisions (and the decisions heretofore controlling in the District of Columbia) is that the test of accrual is not when did

maximum damage occur but rather when did all the facts exist which would authorize a suit.

Under *Wilcox* and *Unexcelled* that date is May 16, 1962. Under the decision below, regardless of the fact that damages existed and a suit could have been brought on May 16, 1962, the three year statute is unexplainably extended to July 22, 1965.

## CONCLUSION

In the face of controlling decisions of this Court and the District of Columbia Courts, the Court of Appeals in the instant case has arrived at the untenable position that a suit for legal malpractice may be maintained more than three years after the plaintiff was first entitled to file suit. The theory advanced by the lower court—that limitations run from the date of the particular damage complained of—presents a serious and substantial question which will result in significant problems in the orderly administration of the District's statute of limitations. Accordingly, the petitioners ask this Court to grant certiorari so as to interpret the Congressionally enacted word "accrues" in a manner consistent with this Court's previous decisions.

Respectfully submitted,

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FORT MYERS SEAFOOD PACKERS, INC.,
*Plaintiff*,

*v.*

STEPTOE & JOHNSON ET AL.,
*Defendants.*

GASCH, District Judge.

This cause came on for hearing on defendants' motion for summary judgment. Defendants contend that the action in the instant case is barred by the three-year statute of limitations. It appears that the essential facts are as follows: Defendant is a partnership engaged in the general practice of law within the District of Columbia, and I. Martin Leavitt is a partner therein. On May 16, 1962, after consultation with and upon the direction of one of defendant's clients, defendant forwarded at the request of his client to plaintiff a draft of a proposed contract to be used in connection with a business venture between plaintiff and a third party in Venezuela. Paragraph Thirteen of this draft contract stated: "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)." Plaintiff agreed on the terms of the proposed contract and in July, 1962, caused its fishing boats to be within the territorial waters of Venezuela. The contract, however, was never signed by the other party thereto. Thus, it appears that plaintiff did not regard the signed contract essential to the sending of his boats to Venezuelan waters. On or about July 25, 1962, the boats were impounded by the authorities of the Venezuelan Government for failure to possess the proper registry.

It is clear that plaintiff never retained Steptoe & Johnson to perform any legal services. There is no factual basis for concluding that the relationship of attorney and client in the formal, or even the usual, sense existed between these parties. The record reflects that one Mogel-

berg, a New York importer of seafood who was a client of Steptoe & Johnson, suggested to plaintiff that it and a Venezuelan corporation enter into a contract, the objective of which was to cause plaintiff's fishing boats and those whose availability it might secure to go to Venezuelan waters for the purpose of fishing for shrimp. The Venezuelan corporation would process the shrimp and subsequently sell the finished product to Mogelberg. The contract related solely to the relationship between the shrimp fisher and the Venezuelan processor. Mogelberg instructed Steptoe & Johnson to utilize as a form for the contract a contract previously drawn up between other parties somewhat similarly situated and which related to Colombian waters. He also requested Steptoe & Johnson to check the matter out at the Maritime Administration and to see to it that all regulations of that body were complied with.

There is no dispute but that there matters were discharged by Steptoe & Johnson. Thereafter, Mogelberg requested Steptoe & Johnson to modify the original Colombian contract in certain respects. This was done. Plaintiff now complains that Steptoe & Johnson did not ascertain from Venezuelan sources, or otherwise, whether plaintiff's fishing boats could fish for shrimp in the territorial waters of Venezuela while flying the American flag and being under American registry. It is undisputed that defendants did what they were asked to do by their client, Mogelberg. Insofar as the record is concerned, plaintiff never retained any counsel to review the contract prepared for it by Mogelberg's counsel.

For the purpose of defendant's motion, the essential issue is the date on which the cause of action arose. Defendant urges that such date should be May 16, 1962, when plaintiff received the contract containing Clause 13. Plaintiff, on the other hand, urges that the date should be July 25, 1962, the date of the impounding of the boats. After consideration of the pertinent authorities, the Court

is of the opinion that defendant's position is correct and its motion for summary judgment should be granted.

The general rule is that, in the absence of fraudulent concealment, an action against an attorney for breach of duty in performing services or for negligence arises at the time when the breach of duty or negligence occurs, not at the time when it is discovered or when actual damage results. Wilcox v. Plummer, 29 U.S. (6 Pet.) 172, 7 L.Ed. 821 (1830); 54 C.J.S. Limitation of Actions § 135c. A comparable situation occurred in Griffith v. Zavlaris, 215 Cal.App.2d 826, 30 Cal. Rptr. 517 (1963), wherein an attorney negligently failed to advise his client as to the applicability of a securities regulation which required the obtaining of a permit. The Court held that the cause of action arose at the time when the misadvice occurred, rather than the date when the alleged negligence was discovered. Similarly, in Goldberg v. Bosworth, 29 Misc.2d 1057, 215 N.Y.S.2d 849 (1961), wherein it was alleged that an attorney had failed to use proper diligence and skill, that Court also held that in the absence of fraud, the statute of limitations began to run when the alleged breach of duty occurred regardless of the time when ultimate damage was sustained. Although no case in this jurisdiction has expressly considered the point, there is *dicta* in a very early case, Campbell v. Wilson, 13 App.D.C. (2 Mackey) 497, 499 (1883), which could call for application of the general rule:

> "It may be doubted whether the law of trusts applies to the case of money collected by an attorney for his client, because that money is not intended to be held in trust, but to be paid over promptly; so that from the moment the attorney fails to turn it over a cause of action arises."

The Court is of the opinion that the reasoning in *Griffith* and *Goldberg*, as they apply the general rule, is correct. Therefore, the Court concludes that the statute of limita-

tions in the instant case began to run on May 16, 1962, and since the instant action was not filed until July 22, 1965, it is not timely. The Court notes that a general averment of fraud, such as the one found in this complaint, does not dictate an opposite conclusion, for this case is one of alleged malpractice alone and the pleadings reflect none of the necessary elements of a cause of action for fraud. See Goldberg v. Bosworth, supra.

Defendant's motion for summary judgment is granted. Counsel will prepare an appropriate order.

# APPENDIX B

# UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

FORT MYERS SEAFOOD PACKERS, INC.,
*Appellant,*

*v.*

STEPTOE AND JOHNSON, ET AL.,
*Appellees.*

---

Appeal from the United States District Court
for the District of Columbia

---

Decided June 21, 1967

EDGERTON, *Senior Circuit Judge:* Appellant Fort Myers Seafood Packers, Inc., sued appellees Steptoe *et al.* for damage due to "carelessness, negligence and improper legal advice given by said defendants . . . to plaintiff." The District Court entered summary judgment for appellees. The court saw "no factual basis for concluding that the relationship of attorney and client . . . existed between these parties." We disagree.

At the request of one Mogdeberg, a client of appellees, appellees drew up and, on May 16, 1962, sent to appellant a proposed contract by which appellant would send its boats to fish in Venezuelan waters and would sell the fish to a Venezuelan processor for resale to Mogdeberg. The contract said "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)."

Appellant executed the contract and sent its boats to Venezuelan waters where, on July 25, 1962, they arrived and were impounded because their entry under American registry was illegal.

Appellee Leavitt admitted that in filing and processing an application to the Maritime Administration for approval of the charters for the boats he had acted as "attorney for the applicants, the boat owners." On August 15, 1962, he wrote to appellant "It is too bad that we did not know the Venezuelan requirements . . . We could have avoided all of the present difficulty by filing the proper applications with the Maritime Administration. Applications for the sale and transfer of the flags of the vessels would have been approved as quickly as were the ones for the charters." If appellant is not obligated to pay appellees for their services, it does not follow that there was no attorney-and-client relation.

We disagree also with the District Court's ruling that appellant's suit, filed July 22, 1965, was barred by the Statute of Limitations. With exceptions not pertinent here, the District of Columbia statute requires actions to be brought within three years "from the time the right to maintain the action accrues." D.C. CODE (1961 ed., Supp. V 1966) § 12-301, 77 STAT. 510. In ordinary negligence actions, this means the time when the plaintiff suffers injury. Thus we said in *Hanna* v. *Fletcher* "The action against Gichner plainly is based on negligence, sounds in tort, and did not accrue until injury resulted from the alleged negligence." 97 U.S.App.D.C. 310, 313, 231 F.2d 469, 472, *cert. denied*, 351 U.S. 989 (1956). Several state courts have adopted a special rule that time begins to run against a claim for malpractice when the defendant does the act that afterwards results in injury. Other courts have applied the general rule that time begins to run when the plaintiff suffers injury. The District Court chose the special rule. We see no good reason for draw-

ing such a distinction between malpractice suits and other negligence actions. The impounding of the boats might have been found to be an injury that resulted from appellees' erroneous legal advice. Since the suit was filed within three years, we think it was timely.

We think the suit was timely whether or not appellees' advice had previously caused other damage. *Cf. Underwater Storage, Inc.* v. *United States Rubber Co.*, —— U.S.App.D.C. ——, ——, 371 F.2d 950, 955 (1966), *cert. denied*, 386 U.S. 911 (1967), where we held that if a trade secret is misappropriated, "the wrongdoer and his privies are amenable to suit for any use of the secret so long as the use has occurred within the statutory period of limitations immediately preceding the bringing of the action." We do not now consider whether it might have been found that appellees' advice had caused damage before the boats were impounded, or whether recovery might have been had for such earlier damage.

*Reversed.*

TAMM, *Circuit Judge*, concurring: I concur in the opinion of Judge Edgerton only because I believe this case is governed by our ruling in *Hanna* v. *Fletcher*, 97 U.S. App.D.C. 310, 231 F.2d 469 (1956), *cert. denied*, 351 U.S. 989 (1956). I am increasingly concerned about the doctrine espoused and validated by the majority opinion in that case, feeling that the dissenting opinion is a more accurate statement of the governing law in these situations. Since a majority of the court, however, has views contrary to my own as those views are expressed in the dissenting opinion of Judge Prettyman, I must be governed by the principles adopted by a majority of the court.

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No. 936

In the

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

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STEPTOE AND JOHNSON, et al.

*Petitioners*

v.

FORT MYERS SEAFOOD PACKERS, INC.

*Respondent*

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*On Petition for a Writ of Certiorari*
*To the United States Court of Appeals*
*For the District of Columbia Circuit*

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## RESPONDENT'S BRIEF IN OPPOSITION

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### QUESTION PRESENTED

Whether the court of appeals was correct in holding that the statute of limitations in a legal malpractice action commences to run when damage from the negligent malpractice occurs and not at the time of the alleged negligence.

## STATEMENT OF THE CASE

The respondent, Fort Myers Seafood Packers, Inc., is a Florida corporation engaged in the business of operating fishing vessels with headquarters in Ft. Myers, Florida (JA 91a). The petitioner, Steptoe and Johnson, is a partnership engaged in the practice of law in the District of Columbia, and the petitioner, I. Martin Leavitt, is a partner in Steptoe and Johnson (JA 13a).

For a number of years prior to 1962, the petitioners represented a New York importer of shrimp and other seafood, Atalanta Trading Corp., of which Mr. Bent Mogelberg was an officer (JA 13a). In April 1962, Mr. Mogelberg was instrumental in arranging a business venture involving respondent, Atalanta Trading Corp. and a Venezuelan firm, Frioven-Zulia, S.A., on the following basis: respondent with its boats would catch shrimp in Venezuelan waters, Frioven-Zulia would process it, and Atalanta would then sell and distribute the shrimp in the United States (JA 38a, 114a).

In order to further this arrangement, Mr. Mogelberg in April 1962, telephoned Atalanta's attorney, Mr. Leavitt, and asked him to send to respondent's president a copy of a contract which had been used between a Colombian corporation and other fishing boat owners in connection with a similar venture in the waters of Colombia. Mr. Mogelberg also asked Mr. Leavitt to send respondent a copy of the form (Form MA-29) used to secure Federal Maritime Administration approval of the charters for respondent's vessels (JA 38a, 93a, 149a). Mr. Leavitt sent this material to respondent on April 12, 1962 (JA 149a). By letter of May 14, 1962, Mr. Mogelberg sent to Mr. Leavitt a copy of the aforesaid Colombia contract along with suggested modifications designed to fit the aforesaid Venezuelan venture (JA 28a-35a).

By May 16, 1962, Mr. Leavitt followed Mr. Mogelberg's suggestions. He incorporated the changes noted by Mr. Mogelberg into a new contract, prepared the contract at the

offices of Steptoe and Johnson and sent two copies thereof with a letter dated May 16, 1962, to respondent. Also with that letter were twelve copies of the Federal Maritime Administration Form MA-29, to be completed by respondent (JA 19a-21a). The letter further advised respondent on what measures were necessary to satisfy the federal customs authorities. The letter closed with a request that all documents be executed and returned to Mr. Leavitt, and the directive that if respondent's president had any questions, he was to telephone Mr. Leavitt (JA 20a-21a).

Paragraph Thirteenth of the aforesaid contract recited that "Neither the laws of Venezuela nor the provisions of this Contract requires or contemplates any change in the present American registry of the boat(s)" (JA 26a). The respondent's vessels were at all times under the American registry.

On June 16, 1962, respondent had signed the contract and mailed it to Mr. Leavitt, with the application forms necessary to secure Maritime Administration approval of the charters on respondent's boats (JA 106a-107a). Mr. Leavitt filed the applications with the Maritime Administration on June 19, 1962 (JA 193a).

Relying upon Paragraph Thirteenth of the aforesaid contract, the respondent's vessels, still under American registry, left Florida waters on July 18, 1962, for Maracaibo, Venezuela (JA 127a). These vessels arrived at the Venezuelan port of Maracaibo on July 25, 1962 (JA 127a). They were promptly impounded by Venezuelan authorities on July 25, 1962, for illegal entry into Venezuelan waters under the American registry (JA 127a-128a). Armed Venezuelan guards patrolled respondent's vessels for twenty days thereby compelling the respondent to forego the entire Venezuelan enterprise (JA 128a).

On July 22, 1965, respondent filed a two count complaint in the United States District Court for the District of Columbia against the petitioners. The first count charged the petitioners with "false and fraudulent warranties," and the second count alleged negligence consisting of legal malprac-

tice (JA 2a-11a). The petitioners, in their answer, generally denied the allegations of wrongdoing and asserted as a Second Defense that "the complaint was barred by the three year District of Columbia Statute of Limitations" (JA 13a). Following the depositions of respondent's president, Carl Abbott, and Mr. Leavitt, the petitioners filed a motion for summary judgment on the ground that the three year statute of limitations had expired prior to the filing of suit on July 22, 1965. The petitioners' position was that the cause of action in negligence, if any, occurred at the time Mr. Leavitt sent the Venezuelan contract to respondent on May 16, 1962; that is, at the time of the alleged negligence, and not, as claimed by respondent, at the time of the injury on July 25, 1962.

This motion was briefed and argued before Judge Gasch of the United States District Court for the District of Columbia on March 15, 1966. On April 25, 1966, Judge Gasch rendered a memorandum sustaining petitioners' position that the statute of limitations had expired before suit was filed (JA 85a-88a). On May 3, 1966, Judge Gasch issued an order granting summary judgment in favor of both petitioners (JA 89a).

The respondent appealed from the summary judgment to the United States Court of Appeals for the District of Columbia Circuit. That court, through a unanimous three-judge panel, one of whom rendered a separate concurring opinion, reversed the District Court. The petitioners filed a petition for rehearing *en banc* which was denied on September 22, 1967.

## ARGUMENT

### The Decision Below Is Not in Conflict with Local Decisions

The decision of the court of appeals was correct and consistent with controlling precedents.

The petitioners have conceded, and the District Court so found, that the complaint alleges negligence consisting of legal malpractice (JA 40a, 88a). It is settled law in the District of Columbia that a cause of action grounded in negligence does not accrue for purposes of the statute of limitations until injury results from such negligence. *Hanna v. Fletcher,* 97 U.S. App. D.C., 310, 313, 231 F.2d 469, 472 (1956), cert. denied, 351 U.S. 989 (1956). In the instant case the negligence complained of consisted of petitioners' misinformation that respondent need not change the registry on its shrimping vessels from American to Venezuelan in order to fish for shrimp in Venezuelan waters (JA 26a).

Acting pursuant to this misinformation as embodied in a contract prepared by petitioners and forwarded to respondent for execution, respondent sailed its vessels to Venezuelan waters under American registry. Upon entering Venezuelan waters on July 25, 1962, respondent's vessels were impounded by Venezuelan authorities for failure to have its vessels under Venezuelan registry. Not until July 25, 1962, did petitioners' misadvice cause damage to respondent. Hence the court of appeals was correct in holding that suit filed on July 22, 1965, was timely.

Contrary to petitioners' assertion in their petition, the court followed the leading District of Columbia case, *Hanna v. Fletcher,* supra, on the question here involved. As noted, that case held that in negligence actions, the action does not accrue until injury. And, the court below saw "no good reason for drawing. . .a distinction between malpractice suits and other negligence actions." 381 F.2d at 262.

Petitioners contend that the court's decision conflicts with local decisions in that it failed to consider alleged in-

jury to respondent before the impounding of its boats on July 25, 1962.

The obvious flaw in this contention is that the petitioners have been and are unable to find any record evidence of injury to respondent before July 25, 1962. Thus, the last paragraph of the court's opinion containing dicta that suit was timely whether or not there was injury before July 25, 1962, cannot possibly "wreak havoc upon the administration of the District's laws" as predicted by petitioners (Petition, p. 9). At most, the court by such dicta noted its approval of the settled rule in the federal courts that in malpractice actions the statute of limitations does not commence running until the plaintiff discovers the damage caused by malpractice even though there may be earlier unknown damage. *Quinton v. United States,* 304 F.2d 234, 240 (5th Cir. 1962), citing *Urie v. Thompson,* 337 U.S. 163 (1948); *Hungerford v. United States,* 307 F.2d 99, 102 (9th Cir. 1962).

Petitioners' reliance on *Wilcox v. Plummer,* 29 U.S. 172 (1830) is misplaced. *There the action was in assumpsit, not negligence.* Therefore, the Court's language to the effect that the action could be brought immediately upon the attorney-defendant's breach of his contractual duty to his client irrespective of consequential damages is inapposite to this case based upon negligence. As already mentioned, it is settled that there can be no cause of action in negligence without damage. An action in assumpsit is based upon a contract, and as noted in *Wilcox v. Plummer,* supra at 181-82, the breach of contract "admit[s] of a definite assignment of date. . .*it is clear that damage is not the cause of action.*" (Emphasis added.) As noted above, damage *is* necessary for a cause of action in negligence. Until it occurs there can be no accrual of the cause of action. And, this record shows no injury before July 25, 1962. Therefore, the court was clearly correct in its decision that the suit filed on July 22, 1965, was not barred by the statute of limitations.

Similarly inapplicable to this case is *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59 (1953), where the United States filed suit to recover damages for breach of contract under the Walsh-Healy Act, 49 Stat. 2036, as amended, 40 U.S.C. 535, et seq. Under that Act, the government could recover damages on government contracts when the contractor employed child labor provided suit was filed within two years after the cause of action accrued. The court held that the action accrued when the wrongful employment of children occurred. Hence, suit was dismissed for failure to file within two years after such employment. The case did not involve a negligence suit much less a malpractice claim.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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